Conflict, Drama and Magic in the Early English Law

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"The maiden touched that clay-cauld corpse,
A drap it never bled.
The ladye laid her hand on him,
And soon the ground was red."
Ballad of Earl Richard.

Whenever the mechanical-magical modes of proof (oath, battle, ordeals) used throughout Europe in the Twelfth Century, are mentioned in a modern law school the instructor senses that his students are at once skeptical and puzzled. It is as if the instructor had suddenly begun to tell fairy tales without announcing any change of pace. Yet we know that the people of that time took much the same view of their modes of proof as the student takes of present-day procedure. How can the instructor demonstrate this, completely and convincingly?

The obstacles to the students' understanding are at first sight very formidable. The problem of looking backward through modern spectacles has bedevilled even the best historians. We are all trained from childhood to adopt as habits the social customs, traditions, and practices of our times. We absorb contemporary prejudices and ideals. When we come to study the ways of the medieval man we find it very difficult to avoid the unconscious assumption that he will always think and act just as we should do in similar circumstances. Our greatest difficulty lies in the use of words. We must rely upon them as our tools of thought and communication, yet many of them call up in our minds little modern pictures[1] which are quite irrelevant to the medieval scene. A "court" was then an assembly of representatives or a great lord surrounded by his vassals. An "inquest" was a group of neighbours summoned to tell what they had witnessed or been told by others. A "statute" was a royal proclamation which could be made with or without the concurrence of lords or commons. It is quite impossible to fit the Anglo-Norman practice of private suit by the injured party, involving a possible fine to the King, into our modern classification of "torts" or "crimes." To get a realistic picture of the past we must almost learn a new language.

Perhaps the most difficult obstacle of all is the student's misconception of the procedure of his own time. The student does not understand a jury trial as a successful trial lawyer understands it. His notions of a modern trial are oversimplified and

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[1] See LeBon, THE CROWD 117-123, (1896) quoted in Lee, LANGUAGE OF WISDOM AND FOLLY 227 (1949).

rationalistic; they may be indicated by such phrases as "government of laws," "jury finds the facts and the judge applies the law," "preponderance of evidence," "irrelevant matters rigidly excluded." His notion that a trial is nothing more than an investigation of relevant facts will not itself bear much investigation. Yet these obstacles must somehow be dealt with. We have, alas! no magic carpet to take us back to the shire-moot. The iron law of pedagogy compels us to speak to the student in terms that are familiar to him, to proceed from the known to the unknown.

We may rely, however, on one common bond of understanding between the modern student and the medieval litigant: they are both human beings. For while instinct and tradition, ideals and prejudices, systems of thought and learning have undergone drastic alterations since the days of the first King Henry, the basic elements of human nature are still the same. Perhaps we may surmount the obstacles discussed by first showing to the student something of his own emotional needs and desires and the effect they have, the part they play, in his relations with his fellow-men. With this foundation to build upon we may proceed to show to what a high degree these same needs and desires, operating among men of an earlier day, were satisfied and reconciled by medieval law. If we succeed in this we shall have also eliminated the most difficult of our obstacles. For having unmasked, with cool detachment, the emotionally satisfying character of Anglo-Norman legal procedure, the student will be well-equipped to perform the same operation on that of his own generation.

What are the factors of human nature which the student of legal history should carefully consider? He should realize that man is a creature of many divergent and contradictory impulses. He is fearfully and wonderfully made; a thousand times more complicated than the reasonable, prudent man of the law or the greedy acquisitive man of classical economics. In the words of Dr. West, "alive within our minds is man loving more than we can trust ourselves to love, hating more than we dare hate; man generous to a fault beyond our faults, man mean and cruel, lustful, cowardly and brave. No human power can 'free us from the body of this death' or from the tremendous possibilities of this our human life."[2]

For a long, long time after birth, through babyhood and childhood, we are dependent on our parents and other adults for many things essential to our well-being — food and clothing, love and care. During infancy we have an unpleasant sense of helplessness and danger; we cling to our parents for the reassurance of their love; we need them to help us and protect us from the harsh and un-

[2] West, CONSCIENCE AND SOCIETY 156 (1945).

known world. The loss of their love would be a terrible calamity. Consciously and unconsciously we strive to win and retain their affection. Becoming deeply rooted in our minds during our earliest years of growth, this fearful need for love and a sense of security remains with us all our lives.[3] We constantly strive to satisfy it by winning for ourselves the love, affection, friendship and respect of our fellow-men. "One of the most striking things about man's social life," says Dr. West, "is that it is so natural to him that he makes the utmost use of his earliest opportunities to develop his various powers of relationship with others."[4]

Beginning in earliest infancy the child builds up in his own mind an ideal picture of himself as he feels he *ought* to be, based, as we have indicated, on his relations with his parents and, as time goes on, his relations with other people. Throughout his life this ideal social self exercises a predominating influence over his behavior. As Robinson explains, "the contents of the self are largely social. A man's most intimate thoughts deal with what he thinks others think about him. Whenever a man feels that his conduct is important he looks upon it as though through the eyes of another person; he stands, a spectator upon the curb, and watches himself go by."[5] Needless to say, we frequently fail to live up to our ideal standards. We lose our tempers, we gratify our selfish appetites, we stand aloof from those in need of help. But if we violate those standards in any drastic manner we suffer the unpleasant pangs of self-recrimination. For example, Lady Macbeth and her husband defied their consciences when they murdered Duncan and his sons; throughout the remainder of the play they are made to suffer the terrible agonies of the mind ridden by guilt.

Susceptible as it is to so many strong and conflicting impulses, the mind naturally must be equipped with devices for reconciling

[3] See Flugel, MAN, MORALS AND SOCIETY 52-58 (1945). At p. 56 he writes: "All these writers seem to consider that man's need of social support is due at bottom to an attitude that he inevitably acquires during his long defenceless infancy in which he is dependent on parental love and care."

[4] West, CONSCIENCE AND SOCIETY 108 (1945).

[5] Robinson, LAW AND THE LAWYERS 179 (1935). See also West, *"A Psychological Theory of Law,"* INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 772, where he writes: "But this crucial fact for social psychology remains. Freud has established it beyond a peradventure, that we grow up possessed of two selves. They are two selves which fortunately for us are seldom as divergent as 'Dr. Jekyll' and 'Mr. Hyde' in Robert Louis Stevenson's famous story. But they are two selves which we can describe as self-acceptable selves and self-rejected selves. The self-acceptable selves are the selves we usually like to be, because they are in consonance with what, by constant readjustment from the nursery onwards, we have come to feel to be what society reasonably demands of us and welcomes in us. The self-rejected selves are the selves we have decided, by the same tokens, to repress."

them. The layman has heard of some of them such as repression, sublimation, compensation and rationalization. He should not assume or infer that there is something abnormal or irregular about the conflict of incompatible impulses. It should be regarded, in Robinson's words, "not as a disturbance in the smooth course of thought and action, but as a fundamental feature of human nature, — the normal man does not have to work out any elaborate compensatory device to make possible the forbearance of a golf game or a fishing trip."[6] The most serious impulses with which the individual must deal are those involving "aggression" against other persons or their property for which we have various labels: cruelty, anger, rage, or fear. None of us are such saints as to be immune from these; when we feel them we usually contrive to turn them aside or dissipate them somehow. Thus on receiving an irritating letter we may angrily crumple the paper or rip it to pieces. Or we may utter profane curses thus breaking a mild rule of conscience and good behavior. But in one way or another, consciously or unconsciously, we must deflect the aggressive impulse if we are to continue in happy relations with our fellows. Since the chief purpose of law is to restrain aggression in the interests of all members of the community the legal historian will take a special interest in all mental devices for deflecting strong emotion or resolving conflicts.[7]

While on the subject of conflicts let us take note of a particular type which the psychologist calls "ambivalence." The arch-type of all ambivalence is found in the relation of parent and child. As we have seen, the child is completely dependent on its parents for love, care and protection. Yet in its early years the parents must constantly frustrate the child's wishes and restrain it from doing many things it wants to do. When the child disobeys them the parents punish him, partly because they are angry, partly to prevent a repetition of the offense. The child, a rather primitive little creature, naturally hates them for it. At the same time the child goes on loving and admiring them. "Indeed," writes Dr. Flugel, "it is man's inevitable tragedy (due to his long period of helpless infancy) that he is compelled to hate those whom he most loves."[8] Almost as soon as it is felt the child's hatred is controlled by various unconscious and automatic processes (the child may reenact the spanking or spank one of its dolls); but the hatred does not disappear entirely. It remains buried deep in the unconscious: when years later the same boy finds himself confronted by an authority-wielding school-teacher the old anger rises up and by the process of fantasy-

[6] Robinson, LAW AND THE LAWYERS 294 (1935).

[7] For some interesting suggestions regarding the relation of emotional conflicts and law see Robinson, LAW AND THE LAWYERS 145-153, 284-307 (1935).

[8] Flugel, MAN, MORALS AND SOCIETY 36 (1945).

identification[9] is directed now against the teacher. For the moment he is cast in the role of the forbidding, punishing father. A good teacher can, of course, by kindness, understanding, and personal charm win for himself, in part at least, the role of the good loving father in the child's unconsciousness association of ideas. In that event he may be quickly forgiven. But woe betide the unfortunate teacher who is cast in the bad father role exclusively; he will be thoroughly hated. The popular caricature of the teacher is not a pretty one.

The process of fantasy-identification is not limited to unconscious associations with the father-figure; every vivid but forgotten experience of childhood may operate in this way. The mind keeps many childhood memories in a locked and secret file: we do not know they are there, but they nevertheless influence, more or less, our every day decisions and actions. "A man may gain employment because of the tone of his voice, or lose it because of the color of his necktie, without his master being in the least aware, at his point of relevant decision, that these were factors in determining that decision."[10] But the father-figure, with its double-barrelled associations of "good father" and "bad father" is deeply imbedded in every one of us. All down through history men have unconsciously attributed "good father" qualities to the judge, the priest and the king.[11] But in times of revolution they did not find it difficult to see the king in a "bad-father" light.

Another ambivalent attitude, of great interest to lawyers, produces our mingled feelings toward the criminal. Why do we feel a strange flutter of pity when we see someone being arrested or riding in "Black Maria"? Why do juries so often acquit the prisoner, in spite of the evidence, when they feel sorry for him? Each of us once stood, a prisoner at the bar of the parental court, where father or mother sat as judge. In that agonizing moment of long ago something went into the deepest part of our minds which now moves us to pity: we "identify" ourselves with the prisoner "in fantasy."[12] And many other examples of "ambivalence" could be furnished from daily experience. Paradoxical as it may seem at first sight, there is really no mystery about it. How often do we remonstrate with our friends to the effect that their thoughts and feelings on

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[9] The phenomenon of fantasy identification is clearly explained by West in CONSCIENCE AND SOCIETY 64-67, 156-159.

[10] West, *"Psychological Theory of Law"* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 775 (1947).

[11] See Reiwald, SOCIETY AND ITS CRIMINALS, Chapter 3, "The Judge and the Father" (1950).

[12] See Reiwald, SOCIETY AND ITS CRIMINALS 48 (1950).

various topics are "not at all consistent."[13] After all, one does not need to study psychology to know that when a girl prettily protests against her boy friend kissing her she may be harboring contradictory feelings.

Psychologists have frequently called attention to the significant part that fantasy and drama play in our lives. Most of us spend a good deal of time following the trials and triumphs of fictitious characters in stories and novels, on stage and screen or radio and television. As children we spend even more of our time at playing "let's pretend." Imaginary experiences satisfy something deep within us. As adults we do not confine our dramatization to the stage. At many times and in many places we take part in little dramatic rituals. Special costumes are donned for weddings, graduations, and formal balls. Special ceremonies are held for inaugurating officials in government and elsewhere. Clubs and fraternities stage impressive rituals for the initiation of new members.

It is not difficult to suggest several mental ingredients in these performances. There is often some gratification of our ego; we all like to dress up and strut around a little. In weddings and initiation ceremonies the participants are both warned and inspired to carry out new obligations in the future. The robes of the priest and the judge lend a special dignity to a solemn occasion. But all these accounts seem to leave something unsaid for the spectators too are affected by them. They receive from the drama a certain sense of security. As the office-holder takes his oath we who watch feel a greater conviction that he will carry out his proper functions. As we watch any of these ceremonies we feel, with varying degrees of intensity, the assurance that that is being done which ought to be done and it will be done for evermore, amen.

The student of legal history will frequently be concerned with the behavior of men acting in concert as members of groups, commonly called institutions. If he is observant (and it is not always easy to be historically observant) he will discover a striking duality in institutional behavior. Most institutions have certain avowed purposes and objectives, often set forth in a creed or ritual. The actual behavior of the members will normally be found to vary considerably from that which would be indicated by the creed or ritual. We should not blame the institutions or their members for this disparity. Like conflict, ambivalence, and fantasy-identification it is the normal phenomenon; it occurs all the time as a part of our day to day life. College fraternities usually have a very idealistic and impressive initiation ritual. As we see them in everyday life they seem to devote most of their energies to drinking beer and holding parties. In their magazine advertisements banks and insurance

[13] See Robinson, LAW AND THE LAWYERS 158-163 (1935).

companies play the role of big brothers and friends of humanity. Lawyers who have to deal directly with these institutions discover that they pursue policies never mentioned in the advertisement. Biographies and memoirs of famous trial lawyers contain anecdotes and other data about the actual working of trial by jury which simply do not coincide with newspaper editorials praising this grand old institution.

A detailed study of the actual operation of any institution invariably reveals sharp contrasts between the actual operation and the little ideal pictures of the institution in people's minds. To anyone who does not realize that this disparity exists in all institutions such a study appears to be an attack upon the institution. This disparity between theory and practice is merely a faithful reflection in institutional behavior of certain characteristics of human nature which we have already discussed. It reflects to some extent the difference between the individual's ideal picture of himself and his actual conduct. It also reflects, to a degree, the difference between the dramas and fantasy which we all enjoy and our everyday activities in the real world.[14]

No outline of the nature of man, either medieval or modern, would be complete without some account of the element of "magic" in our thinking; the fond notion that we can control the external world by manipulating disconnected symbolic objects or casting a spell of words. If the reader thinks modern man has emancipated himself, let him recall to mind the newspaper columns on astrology, the eminent believers in spiritualism, the popularity of quacks and patent medicines, the recurrent sproutings of simple political cure-alls, the faddish little "religions" and cults. Less than three hundred years separate us from the rationalistic seventeenth century, the age of Newton and Descartes, when they burnt cats and women for sorcery. Chief Justice Hale, who coined the phrase "affected with a public interest" and wrote a book on criminal law which still enjoys a high reputation, believed quite sincerely in witches and instructed juries on the proper weighing of evidence of sorcery. Hale was no more fool than you or I; but magic which is easy to detect in other people's cultures is notoriously elusive in one's own.

Magic satisfies many desires: when directed against an enemy it gratifies hatred; when used to make crops grow it brings a comforting sense of security, of optimism and hope. It provides a kind of drama of wishful thinking; but it has a curious logic of its own, much resembling the logic of the unconscious mind dredged up by psychoanalysis. "A man desires his child to grow; therefore he chews the sprouts of the salmon berry and spits it over the

[14] For many illustrations of the psychology of institutions see ARNOLD, SYMBOLS OF GOVERNMENT (1935).

child's body that it may grow as rapidly as the salmon berry. He smears the dust of mussel shells on the child's temples that it may endure as long as mussel shells. . . . It [Magic] teaches, for example, that a treatment of the sword which has caused the wound will cure the wound, or that milk can be made to sour properly by treating the sacred cowbell." Ruth Benedict, who gives these examples and many more, sums up the theory of magical practices as follows: "They [the magicians] are merely acting upon a basic philosophical creed which, if it were explicitly phrased, would be similar to that of the medieval doctrine of the macrocosm and the microcosm which assumes the existence of a mystic sympathy pervading the universe, thus making facts observable or brought to pass in one field significant and operative also in another."[15]

Let us turn now to a shire-moot of the early Tenth Century[16] and see what insights a smattering of psychology may give us. We must take some note, of course, of the economic background: the small villages with their feudal agriculture, the great lonely forests, moors and marshes, the bad roads and slow transportation. We must also notice the political background, a de-centralized feudal arrangement with an aggressive Norman king who has inherited the tradition of a weak Anglo-Saxon monarchy. Many courts have fallen under the control of feudal potentates, great and small, but the shire-moot still retains its independence under the presidency of the sheriff, a royal official. The king's court is with the king; it has not yet made its power felt in every village though the time is not far distant when it will do so in the field of litigation for freehold land.

The shire-moot has no officers to compel the defendant to come to court or to summon him. If, after several summonses by the plaintiff the defendant fails to appear, the plaintiff may obtain the license of the court to seize some of the defendant's cattle as a distraint. If the charge is a grave one the court may eventually declare defendant an outlaw, to be seized and hanged if captured. There are, of course, no police. There is no possibility of judgment by default. A lawsuit is regarded as a kind of voluntary arbitration where both parties come and agree to settle their quarrel by

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[15] Benedict, Article on "Magic" in 10, ENCLYCOPEDIA OF THE SOCIAL SCIENCES 39 (1933).

[16] The account of legal proceedings given here is based upon 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 598-612, 632-641 (2d Ed 1899); 1 HOLDSWORTH, HISTORY OF ENGLISH LAW 297-312, vol. 2, pp. 102-117 (3rd ed.); THAYER, PRELIMINARY TREATISE ON EVIDENCE 7-47 (1898); PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW 108-113 (2nd. ed. 1936). The ancient proofs are all very fully discussed in LEA, SUPERSTITION AND FORCE. (4th ed. 1892). A psychological account of the probable origins of the ordeals will be found in GOITEN, PRIMITIVE ORDEAL AND MODERN LAW (1923).

the traditional methods of the court. But even if the defendant does not come to court he can delay the proceedings for a long time with various *essoins* (excuses). If he does come and the court should give judgment for the plaintiff it still has no officers who can enforce the judgment.

In those days everyone had weapons and knew how to use them. One wonders why aggrieved plaintiffs bothered with such a feeble and dilatory arm of the law. But the shire-moot heard many cases. It is the pressure of public opinion which constrains men to resort to litigation rather than force. Force begets force and in a culture where the tie of kinship is still very strong it begets the blood-feud which may wipe out an entire community. The powerful gregarious "instinct" with its origins going back to babyhood is on the side of law and order as against private war. No one who lives in a village wants to incur the disapproval of the entire community. On the other hand, by going to law in proper fashion the injured party can marshall the sentiments of the community in his own favor and against his opponent.

Assuming, however, that both parties are at the court, ready to proceed, we reach the stage of oral pleadings. The plaintiff states his case in a certain fixed form of words. The defendant states a general denial in all cases but may then proceed to allege a specific defense (e.g., to allege a chain of title to a chattel). But specific defences are rare. These altercations in open court give the angry litigants an outlet for their emotions; each can feel that he is at least doing something to embarrass his opponent.

When the pleading has been completed the court renders the medial judgment awarding the proof to one party or the other and determining the mode of proof to be used. In theory the judgment is that of all the township representatives attending the court (called doomsmen); in practice the judgment is probably determined by a small group of the oldest and wisest. In theory certain rules are supposed to be followed but in practice the decision will be based on sound discretion and common sense. The wisest rule constantly encounters unprovided cases. Moreover, without printing or a legal profession, it would be quite impossible for anything but a few broad general principles to be preserved from generation to generation. In general the attitude seems to have been "defendant stands accused, let him clear himself." If he is a man of good standing he may be allowed to do so by a simple form of oath. If he has been often accused he may be sent to one of the painful ordeals of hot iron or boiling water. On the other hand, the plaintiff may offer to prove his case by battle or witnesses and the doomsmen have the power to award it to him if they consider this a wise course. The award of proof might be a burden or a ben-

efit depending on the mode of proof prescribed. Even the oath could be made difficult by requiring many compurgators. A day is fixed for the proof to take place and the court adjourns. If the party who has been ordered to prove his case appears and performs the proof successfully he has won the lawsuit. If he does not, his opponent is the victor.

Let us consider first the proof by oath or compurgation. It became part of the common law where it lasted a long time under the name "wager of law." The defendant is required to take an oath in a set form of words, denying the plaintiff's claim. A number of other men must then swear, in succession, that the defendant's oath is a true oath. The number of oath-helpers, which may vary as widely as three or seventy-two, is fixed by the court. If a wrong word is used the oath "bursts" and the adversary wins. The oath-helpers are not in any sense witnesses. There is no requirement that they have any knowledge of the facts. At an early date they were required to be kinsmen of the defendant since the kinsmen would be involved in the blood-feud if it were not prevented. Later the defendant might bring anyone whom he could persuade to act for him. However, although they need not have personal knowledge of the facts, they take the risk of Divine vengeance for swearing falsely if their oath be in fact untrue. And should subsequent events on earth show them to be wrong they are punished severely for perjury.

Modern writers have been puzzled to account for a system of proof which relies willingly upon the sworn statements of those who know nothing of the facts and then punishes them if they turn out to be wrong. But men of earlier ages are not absolutely illogical; they merely happen to use one system of logic in a place where we should use another. The basic logic on which the probative force of the oath rests is that a word has some *mystic connection* with that for which it stands. Experience seems to bear this out because by saying "devil" or "snake" you can produce a fairly vivid image in your hearer's mind. If you call a child or a pet animal by name it will come to you. Verbal sorcery assumes such a mystic connection between words and objects; if the words are properly cast together the objects must obey.[17] The common law recognized verbal sorcery, of course, and borrowed some of its logic. We have all been taught that "to A and his heirs" gives A a fee simple and at common law *no other words* will do the trick. The famous rule in Shelley's Case works the same way.

Proof by compurgation uses the same logic in reverse. The defendant and his compurgators have solemnly stated upon oath

[17] See Malinowski, *"The General Theory of Magical Language"* in LEE, LANGUAGE OF WISDOM AND FOLLY 239-243 (1949).

that certain acts and events involving certain persons and objects did not occur. Words have a mystic connection with persons and objects. Therefore, if those acts and events had actually occurred it would have been impossible to fit the false words together; the tongue would slip and the oath would "burst."

The performance of this proof, whether successful or not, served to deflect and dissipate the aggressive impulses of the litigants and their friends. When they all assemble on the day named, to see the defendant make his law, their attention and interest is shifted from the hated opponent and the facts in dispute to the solemn procedure of the oath. Each side watches intently to see who will win. What began as a bitter session of harsh accusations comes now to seem a little more like a sporting event. It is easy for the mind of man to take on two different attitudes at the same time. While each litigant still believes his cause is just he cannot help becoming curious to see who will win. When the proceeding ends and the oath has "burst" or been sworn successfully, some of the friends of the losing party will feel that justice has probably been done as far as that is possible. Even the losing party himself will be aware that he has had "a run for his money," his day in court. He may still be very angry but he will sense that the community is not sympathetic. He is not entirely without remedy. He can go to the king's court and complain of a denial of justice in the shire-moot. But this will be a costly and tedious procedure.

After thinking it over he will probably decide to give it up. However bitter his defeat the losing litigant has one great consolation; he has succeeded in dramatizing his quarrel. He has lifted it out of the run of everyday unpleasant experiences and raised it to the level of a solemn and tragic drama in which he himself played a leading role. He has fought it through to the limit of his resources and he can do no more.[18]

Wager of law had a long history; it was by far the most tenacious of the ancient modes of proof. In the late twelfth century it developed another logical basis of a more modern type; the oath-helpers came to be regarded as "character witnesses." As every student knows, wager of law became the normal proof for the forms of action, debt and detinue, in the King's courts. We see many instances of its use in the fourteenth century. Professional swearers appeared who could do a correct oath for a money payment. Variations were devised by which the court had a hand in choosing the compurgators. Its availability in the royal courts was gradually limited by the judges. Plaintiffs' lawyers all but abandoned the use of debt and detinue in the sixteenth century. As a procedure in

[18] For a psychological account of the litigant's attitude toward a lawsuit see GOITEIN, PRIMITIVE ORDEALS AND MODERN LAW 250-258, 267-275 (1923).

actual use compurgation survived longest in the ecclesiastical courts.

"But surely," says the modern student, "cases must have occurred where litigants offered to prove their claims or defences by the testimony of witnesses to the facts." Why, of course; witnesses were most important in the law, especially when one was buying cattle. In some circumstances the plaintiff could not bring a suit without them. And there is good evidence, though mostly from the following century, of a form of proof by witnesses. There are some scanty rules as to when it may be awarded. The witnesses step up and make sworn statements. "There was no testing by cross-examination; the operative thing was the oath itself, and not the probative quality of what was said, or its persuasion on a judge's mind."[19] The suit is won by the side who produces the most witnesses, provided they all tell the same tale. In short, the proof is made according to a mechanical formula; the oath alone is operative; the judges take no responsibility for determining which side has the most persuasive testimony.

Now these thirteenth century cases are cases decided not by doomsmen but by commissions of royal judges, men of great prestige and power. Why do they hesitate to question the witnesses and evaluate the testimony? To substitute proof by the judge's good sense for proof by counting heads would be a very slight change in a well-established procedure. But this short step is not taken by either doomsmen or royal judges. The community does not want the judges to exercise this power. Deep in the subconscious mind of every seorl and thegn lies the quaint, distorted, but glowing picture of that childhood court of long ago where Father was judge wielding unlimited power. It rises to consciousness not as a "scene remembered," but simply as a feeling, a conviction, a prejudice; this procedure is not "justice." The judges themselves share this feeling. In the Thirteenth Century thoughtful men are dissatisfied with the older proofs and innovations are being tried, but proof by will of the judge is not believed to be the answer.

Our earliest notions of justice are nurtured in the parental court where differences between father and son, brother and sister, are tried. The judge of later adult life cannot escape the unconscious associations with the father, good and bad. The learned legal writing of our own day is full of talk about the need for restraining rules, the evils of "arbitrary" power in the judge. Down through the ages men have been willing to entrust great powers to kings and dictators, to a general of an army, a captain of a ship, a man of property, — but never to the judge.

Of course, in actual practice, judges do decide cases. In the shire-moot, as we have seen, an intelligent and very human dis-

[19] THAYER, PRELIMINARY TREATISE ON EVIDENCE 17 (1898).

cretion is exercised by the elder doomsmen in awarding the medial judgment. But this very real power of the doomsmen is carefully concealed by several protective devices. These devices operate to protect the judge against the "bad father" attitude, jealous of his powers, and also against pressure from the litigants or reprisals from the losing side. The first of these devices is the theory that the medial judgment has been rendered by the entire body of freemen representatives; there is great safety in numbers. The second is the theory that the judgment has been pronounced in accordance with certain fixed rules. Some rules, no doubt, there are but they cannot cover all cases. The third and most important device is the proof itself (oath, ordeal, etc.) which brings the litigation to a climax, distracting all hostile feelings from the judges to the final test. Thus we find an extraordinary array of shock-absorbers concealing and protecting the doomsmen who steer the litigation toward a decision.

Very different from the proof by oaths are the painful ordeals of hot iron and boiling water. The hot iron was more commonly used in England. The administration of the test rested entirely in the hands of the Church as represented by the parish priest. Full instructions were contained in the service books of the time. The accused prepared for the ordeal by fasting three days. On the day appointed the priest said Mass, the accused was urged to confess, if guilty, and received the holy communion. Psalms and litanies were sung. The iron was blessed and adjured to show truly whether the accused was innocent. At the proper moment indicated by the priest the accused took the iron, which was supposed to be glowing hot, in his hand and carried it a distance of nine feet. His hand was then bandaged and sealed by the judges. After three days the bandage was removed. If festering blood was found in the track of the iron he was adjudged guilty; if the wound appeared clean he had proved his innocence.

In England the hot iron seems to have been reserved for charges of more serious crimes. There was a rule that persons who failed at the proof by oath or who had been often accused or whose reputation was bad should be sent to the hot iron. There is a certain mystery about this ordeal; records of the time indicate that the accused frequently succeeded in clearing himself. It seems highly probable that the officiating priest sometimes made the final human decision on the question of guilt. If he believed the accused was innocent or deserving of pardon he tempered justice with mercy by seeing to it that the iron could not inflict too severe a burn. The administration of ordeals was a source of considerable profit to the local churches. A too severe administration of the test with one-sided results might have driven it out of use. Lea, who collected

a great deal of data about ancient modes of trial, went so far as to conclude that "it was a recognized doctrine of the church that confession, contrition and absolution so thoroughly washed away a sin that a culprit thus prepared could safely tempt the justice of God."[20]

A successful political institution must dramatize several important human ideas and contrive to reconcile their contradictions.[21] The hot iron proof admirably met the requirements. In the first place, it was regarded, quite simply, as the judgment of God. Its usual name was *judicium Dei.* Humanity needs a "good father" to decide its great issues of guilt and settle its deadly quarrels. Since the "bad father" feeling engenders hostility to a human judge what could be more natural than to submit the problem to the Father in Heaven?

In the second place, the painful test faithfully responded to the crowd's feeling of ambivalence toward the accused. Since he was charged with a serious offence under suspicious circumstances they hate him as a felon and wish to see him suffer. But because they also sympathized with him they wished to give him one last opportunity to escape. Thus the hot iron enabled the crowd to satisfy both impulses at once. In a crowd men's minds are more easily swayed by their leaders and the cruel savage side of their natures quickly comes to the fore. We all catch glimpses of this at certain moments during boxing matches and football games. Newspaper accounts of riots and strike violence prove it again and again. At the hot iron ordeal the crowd's mood was cruel and morbid, something like that of people who hang around prisons during an execution. Needless to say, the bitterness of the party injured or his kinfolk found an outlet of great satisfaction. And there were no sudden stabs of guilt or fear to interrupt this pleasant orgy of sadism. For this was a necessary and proper proceeding: legal and ecclesiastical too. They were just innocent bystanders holding up their children to get a better view. Of course there is nothing quite like it today; just newspaper columns about the electric chair with pictures of the body.

Did these unpleasant sights of wrongdoers in distress deter like rogues and diminish crime? It was the opinion of Maitland, who studied the early records for many years, that "crimes of violence were common and that criminal law was exceedingly inefficient."[22] However, the ordeal dramatized in a most satisfying fashion the ideal of law enforcement and surely gave many people a

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[20] LEA, SUPERSTITION AND FORCE 402 (4th ed. 1892).

[21] Compare Judge Arnold's account of the modern criminal trial in SYMBOLS OF GOVERNMENT 128-149 (1935).

[22] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 557 (2nd ed. 1899).

comforting feeling that felons were being brought to justice regularly. And many people doubtless assumed (as many do today) that the cruel ordeals and savage punishments (death or loss of the hand, foot or eyes) deterred potential offenders by proving that "crime does not pay." All this brought a sense of peace and security to many minds whatever the actual facts might be. Indeed the very prevalence of so much crime and violence only served to increase the community's need for the comforting illusion that the law was being vigorously enforced.

The ordeal of cold water was likewise carried out under the auspices of the Church. After fasting, prayer, Mass, etc., the accused was bound with his hands beneath his knees and lowered gently at the end of a rope into the blessed water. If his body sank below the surface he was adjudged innocent. Lea suggests that "a skillful management of the rope might easily produce the appearance of floating when a conviction was desired by the priestly operators."[23] It leaned heavily upon Christianity for its support by reason of its similarity to baptism. Its psychological effects upon the community and the complaining party were analogous to those of the hot iron but much less extreme. Where the hot iron was cruel, the cold water was humiliating; where the hot iron was dangerous, the cold water was merely unpleasant.

What shall we say of the famous Norman institution, trial by battle? If we look back at it from the rationalistic point of view of a modern law school classroom it seems primitive and bizarre. But if we remind ourselves that the success of a procedural institution depends very much upon its ability to handle man's aggressive impulses and dramatize his cherished ideals with appropriate seriousness, we can understand its frequent use among the warlike Normans. As some writers have remarked, it was a blood-feud in miniature so insulated that it could not harm the community. It did not operate so much by deflecting and dissipating the litigant's animosity as by confining it to the opponent. But the judicial battle was not a mere duel: there was much more to it than this. Each party stated his case in solemn and traditional form. An issue was reached. The court carefully deliberated and pronounced its considered medial judgment: the issue was to be decided by Divine Providence as in the ordeals. The vehicle for this test was a solemn contest between man and man fought with the traditional weapons of an earlier age signifying the dignity of the occasion.

Women and children and the physically unfit could not fight in person so they were permitted to be represented by an able-bodied friend. Other persons clamored for the same privilege until everyone was allowed to retain a champion except where

[23] LEA, SUPERSTITION AND FORCE 318 n. 1. (4th ed. 1892).

charged with a serious offense. Professionalism reared its head. The litigant was identified with his professional champion in much the same way that a modern college is identified with its football team. For those who objected to changes a comforting fiction was devised by the legal mind: the champion swore that his father was a witness to the true facts in issue and that his father on his deathbed made the champion promise to defend the right.

Dean Pound and others have written of the "sporting theory of justice"[24] which influenced the legal procedure of American states during the pioneer days of the last century. There were very few forms of public entertainment. Of these the lawsuit was one of the most important. Farmers and townfolk would gather at the courthouse to hear the attorneys do battle with ingenious quiddities, grandiloquent phrases and passionate melodrama. It was the same love of a good fight that endeared trial by battle to the Anglo-Normans. Of course trial by battle is too simple a device to satisfy us today; we are much too sophisticated. Imagine millions of dollars hanging on the outcome of a fight between professional sluggers! But there is one aspect of the old battle which modern law has copied and that is the use of champions. The analogy has been frequently pointed out: they used gladiators; we use attorneys. This is a very effective way of absorbing the litigants' animosity toward each other. As in the oath test, attention is shifted from the quarrel to the proof, from the opponent to the opponent's champion. It has been shrewdly observed that in modern litigation each party ends up hating his opponent's lawyer more than his opponent. And if we look at the matter through the eyes of the modern lay client *exclusively* the modern suit resembles even more the ancient battle. For the layman cannot understand all the details of a modern lawsuit: the arguments based on precedents, the fine points of procedural cut and thrust, the choice of various potential "issues." He only knows that his lawyer is in there doing battle for him, and like the medieval client he is uncertain of the outcome. The only important difference, as the layman sees it, is that the medieval slug-fest would seem incredibly crude and vulgar to him. He does not really understand modern legal techniques; he cannot penetrate the screen of words that conceals the human judgments; but he takes it on faith to be profound and learned so he sits back and listens respectfully.

This completes our psychological account of the most important modes of proof used in England in the twelfth century. In stressing their effectiveness for various purposes we must, of course, disclaim any suggestion that wise persons invented them or advocated their use with these psychological effects in mind. Their

[24] POUND, SPIRIT OF THE COMMON LAW 124-128 (1921).

origins are lost in the mists of "non-historical-evidence." The kings, priests, nobles, and doomsmen who supported and employed them had little, if any, psychological insight into their functions in the community. But over a period of time people responded quite unconsciously to their dramatic appeal, their gratification of cruel impulses, and the logic of their magic. These qualities enabled them to survive. Lea describes a number of ordeals and tests (such as the ordeal of the lot) which made their appearance on the stage of history but failed to gain any wide acceptance. They failed because they lacked the qualities we have discussed.

"One point still troubles me," says the modern student. "Surely there must have been some shrewd persons who raised skeptical doubts about these ancient proofs as infallible guides to the truth." Of course there were. From the Ninth Century onward we read criticisms and protests.[25] William Rufus jeered at the hot iron. But the ancient proofs continued in use all over Europe until well into the Thirteenth Century and in some places much longer. From the Ninth Century onward the stream of criticism gathered strength until civilian lawyers, bishops, popes, kings, and emperors were united against them. The human mind is frequently ambivalent; nothing is more common than to find people criticizing a cherished institution which they constantly rely upon. Indeed one might just as well ask: "Are people today skeptical about trial by jury?" Of course they are; and many books have been written on the subject including satirical plays and novels, but trial by jury goes marching on. For several centuries the old proofs were in much the same situation. Critics blasted them; apologists defended them (e.g., by explaining that innocent men sometimes failed at the ordeal as a punishment for their sins). The old proofs continued in use.

"But," says the student, "were not the old proofs eventually replaced by a system of gathering evidence for rational evaluation?" No indeed. In England they were slowly displaced by a "jury of neighbours" who were expected to know the facts of the case from their own experience or from the reports of others.[26] There was no procedure for gathering evidence or taking testimony in court. It was hoped that the "jury of neighbours" had picked up some information before they came to court. But even if they had failed to do this they had to decide the case as best they could. On the Continent the old proofs lost ground to the Romano-canonical inquisitory procedure. This did involve gathering evidence; testimony was taken privately by the judge and written

[25] See appropriate chapter headings in LEA, SUPERSTITION AND FORCE (4th ed. 1892).

[26] See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 621-641 (2nd. ed. 1899).

down. This evidence was then read aloud at a public session. But the judge did not assume the responsibility for evaluating the evidence; a mechanical system[27] was followed which evaluated witnesses according to age, sex and social rank and produced whole proofs, half proofs, quarter proofs, etc. The supposed force of the written proof rested upon the fallacy of mystical connection explained above; the judges merely declared whether or not a proof had been made according to the "ancient" rules. It would be a long time yet before a judge anywhere would dare to use his common sense and reason in evaluating evidence.

"Well then," says the student (having learned his lesson only too well) "if the old dramatic magical proofs were so deeply rooted in human needs and desires, how do you explain the fact that the 'jury of neighbours' dislodged them and took their place in popular esteem?" That is rather a long story. When trial by "jury of neighbours" first appeared it was a royal privilege available only in the king's courts. There were, of course, many other courts of great importance where it is unknown. And in the royal court it was merely one of several modes of proof; oath, battle and ordeals were used there also. In the competition of proof against proof several factors contributed to the jury's success. First, trial by battle was a Norman proof, never very popular with the Anglo-Saxons and quite expensive. Secondly, in 1215 the Lateran Council denounced the ordeals and withdrew the support of the church. The church's power was very great in England at this time and the ordeals never recovered from the blow. The king's judges had to find a substitute. Thirdly, the type of case assigned to the jury in its early days always involved the question of recent possession of land — a matter of fact about which the jury and the rest of the community would not be likely to disagree.

But the best reason for the jury's success lay in the fact that it was able to draw to itself all the dramatic elements and magical logic of the ancient proofs so that people could think of it as functioning just as they had functioned. Almost everything was preserved except the cruelty and violence of the hot iron.

First, it introduced into the royal courts' procedure a new type of battle. With the older proofs the pleadings were simple and declamatory: there was no point in telling the court about an involved set of facts when the issue of greater right was going to be settled by battle. But when the proof is by jury we find plaintiffs stating their claims in great detail to bring the facts to the jury's attention. We find defendants alleging specific facts which they hope will upset the plaintiff, because the jury will know they

[27] See ENGELMANN, HISTORY OF CONTINENTAL CIVIL PROCEDURE 41 ff. (1927).

are true.[28] We find the royal judges who preside at these pleading sessions laying down rules of law and disallowing certain defences. In short, the pleadings must be framed to win the jury's verdict and the royal judge's approval. Though orally announced they are now recorded in writing. Pleading became a difficult art and the legal profession was born. The skilled pleader became the client's champion in the new style of trial by battle.

The jury duplicated the oath-helpers very closely. The older logic of word-magic could be applied to a verdict under oath as well as to a series of oaths. Oath-helpers are thought of as "character witnesses"; juries can be that, too, for they are "of the vicinage." What then of the judgment of God? Why, the jury simply took that over also. Divine Providence could speak as well through the verdict of twelve as through a burnt hand. That is why their verdict had to be unanimous and there was virtually no appeal from their decision. While they deliberated they took no food or drink. Finally let us notice that they do the work of the older proofs in an even more important respect. The royal judge with his strong king behind him makes a rather impressive father figure. But his position becomes much more secure when he has the jury below him as a "shock absorber."

[28] See POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 616 ff. (2nd. ed. 1899).